



Vodafone / Hutchison 3G

Additional submission to the CMA responding to the Parties' proposed wholesale remedies and third-party submissions on remedies for the proposed merger of Vodafone and Hutchison 3G

10 October 2024

1. Executive summary

1. Sky welcomes the opportunity to expand on its very strong concerns about the risk of weak wholesale remedies. We hope it was helpful and informative to hear about our direct experience as a participant in the market and the commercial realities of operating as a mobile virtual network operator (“MVNO”). We consider that our evidence is important in helping to inform the CMA’s analysis on the practical challenges of designing effective wholesale remedies in such a dynamic and evolving sector.
2. This additional submission is focused on the problems with the Parties’ proposed wholesale remedy the Wholesale Reference Offer (“WRO”) set out in its submission of 27 September (“the Parties’ Response”) and our proposed stronger and enduring [REDACTED] remedy. We also explain why some remedies put forward by third parties, including a partial divestiture, will not effectively address the provisional wholesale (and retail) substantial lessening of competition (“SLC’s”).
3. We would like to reiterate that it is crucial the CMA gets this right because, if approved with weak remedies, this proposed agreement (“the Merger”) will set the permanent structure of this critical market, which affects millions of consumers and small businesses and threaten the feasibility of UK MVNO businesses. Many millions of pounds are at stake if the CMA gets this wrong, as well as material ongoing harm. Sky agrees with the CMA’s Provisional Findings on the wholesale and retail SLCs, and the significant harm that will arise from this Merger. Absent effective and strong remedies the CMA must block the Merger.
4. We would emphasise that our experience is that wholesale competition is highly dynamic, with both the level of interest from bidders and the terms they offer, substantially changing over time between and within tenders. This **dynamism cannot easily be replicated through static short-term regulatory-type remedies such as a generic wholesale reference offer or ringfencing**, particularly when the wholesale terms are not negotiated and entered into upfront and are instead a ‘take it or leave it’ standard offer to all MVNOs. These remedies try to prevent things from ‘getting worse’ for MVNOs – but only for a sub-set of terms, only temporarily and only in effect setting a price ‘floor’ for the industry.
5. These wholesale remedies set the bar much too low and clash with the CMA’s own legal framework which looks to fix the competition problems created by a merger at source. The CMA does not have to rely solely on Sky’s commercial experience to demonstrate the problems with these types of remedies, it can look at how they have failed in other countries as the main remedies to address wholesale and retail SLCs. This is indisputable evidence that directly shows what could and did go wrong with weak wholesale remedies.
6. Not only are standardised reference offers ineffective – but it is very clear that the Parties’ proposed WRO is particularly weak as one of the main remedies to address the significant concerns raised by the CMA in its Provisional Findings. This submission systematically steps through the flaws in this offer in more detail. In particular, the Parties’ proposed WRO:
 - **Limits direct competition to the MNOs** – gating to fewer than 2.5m subscribers excludes scaled competitors [REDACTED]
 - **Is very short-term** – the restricted availability (for three years) means many MVNOs will not be able to access it and after three years all protections fall away. [REDACTED]

[REDACTED]

- **Restricts access to technology** – the 150 Mbit/s limit directly prevents competition with MNOs for customers on high-end plans and stops the best network capabilities being available to MVNOs; any ‘guarantee’ regarding access to new technologies needs to be much firmer. [REDACTED]
- **Restricts and unifies pricing** – the three tiers result in a common pricing structure that risks creating a ‘floor’ which encourages more uniform market-wide pricing. [REDACTED] More worryingly, the future pricing mechanism, while enabling the offer to evolve, appears to ensure that wholesale prices increase when the merged entity’s ARPU increases. This **will create lock-step market inflation** [REDACTED]
- **Restricts supply despite the surplus capacity created** – [REDACTED]

7. Indeed, far from reassuring us that wholesale competition will be protected, this type of weak offer indicates to Sky that the merged entity will have no genuine interest in offering competitive terms to MVNOs that directly compete with the three remaining MNOs post-merger. In our view, this proposal demonstrates that Vodafone UK (“Vodafone”) and Three UK (“H3G”) (together “the Parties”) are just ‘going through the motions’; once any reference offer falls away (in this case, after just three years), they would have no appetite to host directly competing MVNOs.

8. [REDACTED]

9. If the CMA are serious about retaining a competitive market, while enabling extra network investment, [REDACTED] A standardised weak offer as put forward by the Parties is insufficient. [REDACTED]


10. [REDACTED]

1 [REDACTED]



11. A partial divestiture, suggested by just two third-party respondents as an alternative approach, would be significantly riskier, more complex and could fundamentally undermine the intended network efficiencies. Most respondents agree this would be a very challenging and risky remedy.
12. Without strong, effective and durable remedies, Sky would have very **serious concerns about the legality of the CMA's decision**, given the substantial flaws and very limited evidence in support of such weak remedies, and the inconsistency with the CMA's guidance and its approach in previous mergers. We also have significant procedural concerns because Sky's ability to meaningfully comment on remedies - that will directly impact our business - is highly restricted, given the level and number of redactions in the Parties' submission.
13. Furthermore, the CMA must also ensure that Sky has further opportunities to comment and provide submissions on the Parties' proposed wholesale remedy - or any variants or additional remedies put forward (particularly if the CMA and/or the Parties consider that there are other strong remedies that address the competition harm). Sky expects the CMA to give it the opportunity to continue to play a constructive role in any discussions with the CMA and, if appropriate, with the Parties. Without this, Sky reserves its right to take any further legal steps necessary to ensure due process.

2. Generic reference offers and ring-fencing remedies do not work as the main remedies to address the concerns found by the CMA

14. As noted in our previous submission, there is already a significant amount of evidence casting doubt on the effectiveness and timeliness of generic wholesale remedies such as reference offers or broad capacity ring-fencing remedies as one of the main remedies to a substantial wholesale and retail SLC. The risk that these types of standardised remedies are not sufficiently effective is particularly high for MVNOs like Sky that are directly threatening MNOs.
15. Based on our experience, this type of remedy will suffer a significant number of inherent problems and ultimately cannot replicate a competitive process, in that they will:
 - **By necessity be standardised** - and cannot therefore possibly cover all the terms and nuances offered by specific deals negotiated under competitive circumstances or be sufficiently tailored to protect MVNOs most at threat from this Merger e.g., Sky has various additional and important protections that it builds into deals 

- [REDACTED]
- **Not be dynamic** – deals will inevitably be somewhat static (even with some form of future change mechanism), as it will be impossible to determine all the key details upfront depending on the changing context and market conditions [REDACTED]
 - **Not be durable** – a fixed offer that only covers a set period (however long), will mean that any protection will come to an end and at that point there will be a cliff edge creating significant uncertainty and risk for an MVNO, particularly for mass-market MVNOs like Sky where MNOs are less incentivised to make offers. The shorter the period, the more difficult it will be for MVNOs to plan to invest in growing and expanding their business – particularly if there is uncertainty over both future input costs once any offer ends and the strategic approach of the host MNO as to whether they want to participate in a new tender. This is a point also made by other MVNOs in their responses.
 - **Prevent innovative, differentiated deals** – while in principle it is possible to have different deals, without competition there will be no incentive for MNOs to deviate from the standardised offer (i.e., wholly variable per GB rate or other improved terms). [REDACTED]
 - **Distort competition** – as previously explained, far from replicating a competitive dynamic process, standardised offers simply encourage and enable greater symmetry (given it is inevitable the specific terms become industry knowledge). In contrast, to date Sky has seen significant variation in the commercial offers put forward, this is particularly the case given what is being priced is a zero marginal cost item.

Problems borne out: Ireland suffered years of limited competition

16. In May 2014, following a Phase 2 merger investigation, the European Commission (“EC”) granted formal approval for Hutchison’s acquisition of Telefónica Ireland.⁴ The merger combined the second and fourth largest mobile network operators (“MNOs”) in Ireland, reducing the number of MNOs from four to three. This consolidation resulted in a market with two dominant operators, with a third, smaller competitor trailing behind. Excluding Tesco Mobile – which, as in the UK, was a 50:50 JV between Telefónica and Tesco – MVNOs accounted for fewer than 3% of subs at the time of the merger.⁵
17. The package of weak remedies (discussed below) failed to have any significant impact, resulting in years of very little competition. As set out below, a number of ex-post studies have highlighted the problems this created.
18. The EC considered Hutchison as an important competitive force in the Irish mobile market and raised concerns that the merger would reduce competition and increase prices to the

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⁴ European Commission (May 2014), [Mergers: Commission clears acquisition of Telefónica Ireland by Hutchison 3G, subject to conditions](#).

⁵ Ofcom, Technical Annexes: Market Structure, Investment and Quality in the Mobile Industry, 22/12/2020, Para. A7.4.

detriment of consumers. Consequently, the approval was contingent on three main commitments:

- an MVNO remedy – Hutchison committed to enter capacity agreements with two MVNOs (up to 30% of the merged entity's capacity);
 - an MNO remedy – Hutchison offered to divest spectrum to the MVNOs in the previous commitment, with the option available to the MVNOs until 2026 (ten years); and
 - Hutchison agreed to continue the existing network sharing agreement between Eir and Telefónica to ensure that Eir remained an effective and viable competitor.
19. Two MVNOs, iD Mobile and Virgin Mobile entered the Irish mobile retail market on the Hutchison network as a result of the merger commitments, but neither managed to make a significant impact on the market - as warned by ComReg at the time.⁶ Having failed to gain sufficient scale iD Mobile exited the market in April 2018, while Virgin Media only has a small subscriber base (<0.1m subs) and continues to play only a very limited role.⁷
20. Sky's understanding is that the key driver for the failure of this wholesale remedy is that the limited nature of MVNOs in the Irish market at that time meant that a new entrant (iD Mobile), as opposed to an established player, took the remedy and only after the EC had cleared the merger. We believe that iD Mobile likely underestimated the complexity of the business they were entering. This is made clear in the 2017 Dixons-Carphone Annual Report.⁸ This contributed to iD Mobile's challenge to scale its business and control the business (exemplified by the high rate of handset fraud iD Mobile is thought to have suffered).
21. Two independent (and substantive) ex-post analyses very clearly found that the remedies failed as the merger negatively affected investment, network quality, and prices:
- Ofcom (2020) found that there was a decline in country-level investment relative to a counterfactual scenario absent the merger, coupled with a negative impact on network quality and slower download speeds.⁹
 - BEREC (2018) analysis found that the merger led to a statistically significant price increase.¹⁰ Additionally, it concluded that the impact of the MVNO remedy was small, noting that two MVNOs entered the market in the second half of 2015, but their market share remained below 1% each by mid-2017 and one of the MVNOs left the market in 2018, as discussed above.
22. BEREC's overall conclusion was that caution should be taken with 4-to-3 mergers. It said that "MVNO remedies may take considerable time to become effective or might not be sufficiently effective".¹¹ This conclusion was based on evidence showing that, even with such remedies, mergers resulted in price increases in the short to medium term.

⁶ ComReg expressed reservations that they would be insufficient to preserve competition in the Irish mobile market Financial Times (May 2014), [Irish telecoms merger meets opposition despite EU approval](#). See also [WIK Consult Report \(comreg.ie\)](#) – it is also worth noting that this report highlights the importance of the existence of rivals with smaller markets shares acting as disruptors and that more generally markets with three players tend towards oligopolistic outcomes which in the long-run fail to deliver good outcomes for consumers.

⁷ Concerns over the sufficiency of the MVNO merger commitments as a means of facilitating the entry and expansion of new challengers in the market seem to have been supported by the subsequent exit of iD Mobile and the limited role played in the market by Virgin Mobile today. See Irish Times (2017), [MVNOs fail to shake up mobile market](#).

⁸ This report stated that "as [iD Mobile] is a capacity MVNO...This brings with it excellent control, but that comes with upfront costs and increased administration." Carphone plc Annual Report and Accounts 2016/17, p. 23.

⁹ Ofcom (2020), [Market structure, investment and quality in the mobile industry](#).

¹⁰ BEREC (2018), [Report on Post-Merger Market Developments -Price Effects of Mobile Mergers in Austria, Ireland and Germany \(europa.eu\)](#), (2011-2016).

¹¹ BEREC (2018), [Report on Post-Merger Market Developments -Price Effects of Mobile Mergers in Austria, Ireland and Germany \(europa.eu\)](#), (2011-2016), page 41.

23. This example underscores the importance of securing a credible remedy-taker. In the Irish case, both MVNOs struggled to scale due to their lack of prior presence and experience in the Irish mobile market. Their inability to grow as strong competitors hindered the remedy's effectiveness. As we explained in our previous submission, in the few cases where remedies have been effective (or could be effective for most recent transactions), a specific credible remedy-taker was identified at the outset.¹²

[Redacted]

24. [Redacted]

- [Redacted]
- [Redacted]
- [Redacted]

25. [Redacted]

[Redacted]

[Large redacted block]

26. [Redacted]

¹² Sky's initial remedies submission, paragraph 24.

27.

[REDACTED]

3. The Parties' wholesale remedy has substantial flaws

Limits any prospect of direct competition

28.

[REDACTED]

29.

[REDACTED]

The cap excludes scaled competitors

30. In arguing for an arbitrary cap of 2.5m subs, the Parties state that larger MVNOs “*have particularly significant bargaining power, they are protected by long term contracts, use formal tender processes and will always receive bids from all MNOs that enable them to secure attractive terms.*”¹⁵ This is clearly not the case:

- **Not all MNOs always bid or bid competitively:**

[REDACTED]

¹³ Parties' Response, para 6.11.

¹⁴ Parties' Response, para 6.24; MVNOs are divided into those with >0.5m subs, 0.5-1.0m, and 1.0-2.5m.

¹⁵ Parties' Response, para 6.17.

¹⁶ Sky's Initial Submission to the CMA, October 2023, para. 88.

- **No significant bargaining power:** [REDACTED]
- **No long-term protection from contracts:** our current contract expires in [REDACTED] however, in practice, as explained during the hearing, [REDACTED]
- **No difference with formal tender processes:** it is unclear why a formal tender process offers any more protection than an informal process – both ultimately rely on the number of bidders and interest at that time, driven by how much competition is left between MNOs.

The cap disincentivises all other MVNOs from scaling and competing

31. The 2.5m subscriber cap will act as a very strong disincentive for MVNOs to grow beyond this size, as this will remove any pricing protections offered via the WRO. This provides a clear indication that the Parties are not interested in dealing with MVNOs, which could compete at scale for their customers and this cap directly constrains the ability of MVNOs to do so.
32. This is a critical flaw, as this effectively caps the size, growth and subsequent competitive pressure that could arise from the entire MVNO ecosystem. The result is that MVNOs will be a weaker and more limited competitive force in the market, who will struggle to compete in any meaningful way with the MNOs – failing to address the wholesale (and retail) SLCs provisionally identified by the CMA.

33. [REDACTED]

¹⁷ Provisional Findings, para. 9.192(c)(ii).
¹⁸ Provisional Findings, para. 9.192(c)(iii).
¹⁹ Parties' Response, para. 6.25.
²⁰ Parties' Response, para. 7.9.

[REDACTED]

34. [REDACTED] it will mean they cannot offer competitive pricing on high data or unlimited plans.

35. The Parties also claim that a further reason for not having capacity ringfenced is because of the inefficiencies by preventing “*the MergeCo [from utilising] the same capacity across its entire retail and MVNO bases*”.²¹ To some extent Sky agrees with this in relation to a generic capacity ringfence – as we noted in our previous submission, if the quantum is set too high (and not available to the MNO) such a cap could risk leading to inefficiency if unused, but if set too low MVNOs would struggle to deliver the services and this would reduce competitive tension.

36. However, this would not be a problem with Sky’s proposed [REDACTED] remedy.

[REDACTED]

The ‘first-come, first-served’, combined with a cap – limits its scope

37. [REDACTED]

38. This combination of terms will act as a signal to the market that – beyond the three WRO recipients – the Parties may well not compete in future wholesale processes at their current pricing level. This will lead the other MNOs to respond accordingly, increasing prices for all but the three WRO recipients at the point when they renew their MVNO deals.

39. Such a reduction in wholesale competition would be precisely the kind the CMA warned about, through which the Parties “*have less of an incentive to bid for wholesale business. [Leading other MNOs to have] incentives to compete less aggressively.*”²²

Restricts access to new technologies

150Mbit/s limit means MVNOs cannot offer the same level of service as the MNOs

40. The Parties propose that the WRO will only “*apply to speeds of up to 150Mbit/s on the MergeCo’s network.*”²³ With any “*access to the highest network speeds/quality to be negotiated separately, outside the WRO terms.*”²⁴ This means that the Parties cannot offer the same level of service that MNOs are capable of offering – putting them at a significant disadvantage.

²¹ Parties’ Response, para 6.20 and 6.22.

²² Provisional Findings, para. 9.628(i).

²³ Parties’ Response, para. 6.13.

²⁴ Parties’ Response, para. 6.13.

41. This creates a significant commercial challenge for MVNOs, as it leads to a worse network performance for MVNO subscribers relative to those on the host network.
42. Given this limitation, MVNOs will be effectively unable to compete on high-end plans if they are hosted on the merged entities network and would need to separately negotiate access to this higher-quality network outside the framework offered by the WRO.
43. This represents a direct example of the issue noted in the Provisional Findings, of the “*Merged Entity [acting] on these incentives by... offering less competitive prices/terms.*”²⁵ As the CMA notes in this paragraph, it would be expected that the other MNOs – being made aware of the Parties’ intentions via this process – are likely to simply follow suit by placing further limits on the terms offered to MVNOs in future negotiations.

Not strong enough guarantee for access to new technology

44. While it is helpful to see that the Parties have proposed some form of commitment around ensuring the provision of new technology is available to MVNOs, Sky considers this could be made a much firmer and clearer commitment. The Parties have said their current approach is to typically make new technologies available to the MVNO within nine months of being launched by the MNO, but that this would be “*subject to a negotiation.*”²⁶ This is a good example of the type of loose framing that would enable this type of WRO to be gamed and/or frustrated by the merged entity once the CMA is no longer involved, and demonstrates the challenges involved in trying to ‘lock down’ all the different ways this remedy could be undermined in advance.

Only short-term, no enduring protections

Three years significantly limits the ability of MVNOs to take-up the offer

45. The Parties are proposing that the WRO is only made available to the market “*for a period of 3 years following completion.*”²⁷ Yet the CMA is very clear in its Provisional Findings that the SLC is an enduring one: “*In this Merger, the SLCs provisionally identified are not time limited.*”²⁸ Therefore there is no rationale or basis for limiting the remedy to such a short timeframe – indeed arguably any arbitrary time limit where the remedy falls away will not comprehensively address the enduring nature of the SLC.
46. In practical terms, this significantly limits whether and which MVNOs can take up the WRO, as many may be locked into longer contracts with other MNOs. This means it will be ‘pure chance’ as to which MVNOs can take advantage of the WRO as it will be entirely dependent on the timing of their contract expiry, or whether a break clause exists allowing them to act on the WRO. This is not fair, is discriminatory and falls very far short – again showing that the Parties do not have serious intentions to support MVNOs.

The five-year term is short, creating a cliff-edge for any takers

47. The Parties’ proposed term for its WRO is also relatively short in duration, only offering “*MVNOs [the ability] to agree contracts with a term of up to 5 years.*”²⁹
48. The five-year term creates a cliff-edge for MVNOs, limiting their ability to leverage any favourable pricing received to generate scale. Given that the WRO only operates for such a

²⁵ Provisional Findings, para. 9.628(i).

²⁶ Parties’ Response, para 6.32.

²⁷ Parties’ Response, para. 6.17.

²⁸ CMA Notice of Possible Remedies, para 28.

²⁹ Parties’ Response, para. 6.17.

short period, any recipient will inevitably run their business with one eye on what problems they may well face on renewal and the likely significantly worse terms offered at that point.

- 49. The Parties claim that this means that “*the overall duration of the WRO terms is up to 8 years*”³⁰ – yet this is clearly not the case. Given the three-year cap on takers and the first-come, first-served nature of the arrangement, it seems likely that MVNOs taking up this WRO would roll off their five-year contract long before the planned efficiencies may have been delivered by 2032.
- 50. Furthermore, as noted above, even by this point there is no reason to believe that these efficiencies will generate a more competitive wholesale market. Potentially the reverse will be true given what Sky has seen before – e.g., when Vodafone thought it had the best 4G network, it pulled back from the wholesale market.

Restricts the competitive pricing that MVNOs can obtain

Creates uniform pricing which effectively becomes a ‘floor’

51. [Redacted]

52. [Redacted]

53. [Redacted]

The “Future Pricing Mechanism” forces MVNO prices to increase in unison

- 54. The Parties are also proposing that this pricing is subject to a “*future pricing mechanism*”, which will take into account the Parties’ retail ARPU, average data usage, and the prevailing WRO rate.³² This mechanism means that “*when MergeCo’s data usage per customer increases, or where MergeCo’s ARPU decreases, the MVNO wholesale rate is reduced proportionally*”.³³

55. [Redacted]

56. [Redacted]

³⁰ Parties’ Response, para. 6.17.
³¹ Parties’ Response, para. 6.27.
³² Parties’ Response, para 6.30.
³³ Parties’ Response, para 6.31.
³⁴ Provisional Findings, para. 8.322.

[REDACTED]
[REDACTED]. This is an anticompetitive outcome; not that of a healthy market.

MNOs not incentivised to host directly competing MVNOs [REDACTED]

57. In practice, the larger an MVNO gets, the more likely it is to compete directly with the MNO and the greater the impact the MVNO has in taking customers away from the MNO (as opposed to attracting new/different customers). It makes no commercial sense for any rational business to supply one of its competitors that poaches its customers. The only reason it would do so is if they thought that the MVNO was going to get capacity through another such that it would be a threat anyway, and the MNO would have then foregone the wholesale revenue. Therefore, the only factor offsetting the disincentive to wholesale is the threat of other MNOs hosting the MVNO.
58. If the Merger is approved, [REDACTED]
[REDACTED] As the CMA itself recognised, “MNOs may be incentivised to offer less competitive pricing or terms where the MVNO competes more closely with the MNO’s own retail business” – and they are incentivised to behave like this even if an MVNO ultimately obtains wholesale services from another MNO.³⁵
59. As we explained at the hearing, this must also be seen as a repeated game - where MNOs can see that Sky is a growing player (as the CMA’s Provisional Findings made clear) and therefore any rational business would not want to continue to ‘support’ such a growing disruptive competitor. Furthermore, with only three MNOs operating in the wholesale market it also becomes much easier for MNOs to reach a common implicit ‘understanding’ of what is best for them all, i.e., the exclusion of ‘mass-market’ MVNOs. The existence of four players makes this much more difficult.
60. The ‘cannibalisation’ risk that MNOs take when supplying an MVNO like Sky is evident when looking at where Sky’s new customers are coming from. As set out in Figure 3.1, [REDACTED]
[REDACTED]
[REDACTED]

³⁵ Provisional Findings, para 9.208 (b)(i).

[REDACTED]

- 61. [REDACTED]
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⁵⁵ [Market_Participant_D_response_to_the_notice_of_possible_remedies.pdf \(publishing.service.gov.uk\)](#), para 5.6.

⁵⁶ [Market_Participant_D_response_to_the_notice_of_possible_remedies.pdf \(publishing.service.gov.uk\)](#), para 1.6.

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109.

5. Partial divestiture is risky and uncertain

110. Sky notes that most responses agree that a partial divestiture would be a very challenging, complex and uncertain remedy to pursue at this stage. This remedy fundamentally risks undermining the delivery of the network efficiencies as claimed by the Parties, which we understand to be the key rationale for not simply prohibiting the Merger despite the very substantial SLCs provisionally found by the CMA. Its risk profile is also such that the CMA could end up with a failed remedy for the significant SLCs it has provisionally found.
111. Sky is aware that two of the submissions to the CMA's possible notice of remedies⁶⁴ have, however, suggested that a partial divestiture would be an effective and feasible remedy option. We strongly disagree for a number of reasons:
- **Complexity and risk profile** – [REDACTED], a partial divestiture remedy is significantly more complex to implement, and this would put a considerable burden on the CMA and Ofcom in designing and overseeing the effective implementation. The experience in other countries has also shown that entry in the mobile market is hard and the CMA would be choosing to accept a remedy with a widely recognised very significant risk profile, which is inconsistent with its Guidance.
 - **Impact on customers** – a divestiture would have a potentially very disruptive impact both on end consumers and on the Parties' wholesale customers, as well as disrupting the running of the network sharing arrangements.
 - **Risk of undermining efficiencies** – while we note that the submissions appear to argue that the new entrant would not be bound by the Parties' previous historic assets, it seems unlikely that the majority of the claimed efficiencies result from reliance on legacy network and/or equipment.
 - **Importance of a credible purchaser with UK experience** – an entirely new entrant will have no track record within the UK, meaning it will remain highly uncertain whether that retail proposition will be successful or not.

⁶⁴ Market Participant F's response and Market Participant E's response to the notice of possible remedies.

- **Long timeframe** – as seen in the US⁶⁵, it can take a significant amount of time to implement and transfer over the assets to a new entrant and for that entrant to be ‘up and running’ able to offer a substantial retail constraint on the other MNOs – particularly for an entirely new entrant that has no existing brand and/or presence in the UK market.
- **May not address the wholesale SLC** – given the substantial task that would be facing the new entrant in establishing itself as a retail competitor, it would be highly unlikely that this entrant would also seek to establish itself, as least in the short-medium term, also as a wholesale host. This means that the wholesale SLC would remain a concern for a reasonably long period of time while that entrant establishes itself.

112. **Sky therefore strongly agrees with the CMA’s concerns around both the practicality and inconsistent rationale behind such a remedy. The CMA’s own ex-post evaluation of mergers highlighted the greater risk of such ‘carve-out’ remedies.**⁶⁶

6. [REDACTED]

113. As reiterated to the CMA in our remedies submission, Sky would have fundamental concerns if the CMA were to depart from its established and proven-approach in remedies, given the strength of concerns about the effects of the Merger not just from MVNOs but from MNOs such as BT, and consumer groups such as Which?.

114. Indeed, the importance of consistency was recently reinforced by CMA Panel Chair, Martin Coleman, who said that the CMA in its merger decisions seeks to:⁶⁷

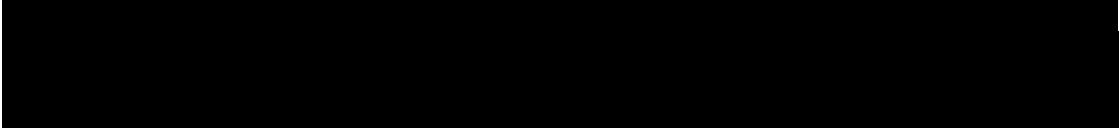

“Ensure that practical judgements can be made within a clearly understood legal and economic framework. Predictability of the principles we apply is itself an important contributor to ensuring business and public trust.”

115. In this speech, Martin Coleman also emphasised the importance of giving the merging parties extensive opportunities to make representations, direct interaction and facilitate earlier discussion of potential remedies. As a business subject ourselves to the merger regime, we understand and agree that this is important to uphold the rights of defence. However, it is also fundamental that the CMA does not fall into the trap of only listening to and hearing from the merging parties. The Parties inevitably have strong incentives to achieve clearance without remedies or in this case with the weakest, least well-defined remedies, that bind their hands as little as possible. But in this case the wholesale remedies directly impact and rely on the MVNOs to make them work. Therefore, it is incumbent on the CMA to give sufficient time and transparency to businesses that will be directly impacted by the Merger. Of course, we are also heavily incentivised to protect our own businesses and - [REDACTED] - this is why we are proposing this remedy.

⁶⁵ In T-Mobile / Sprint (2020), the US mobile market has significantly suffered from ineffective competition and increased prices due to the weak and ineffective remedies - leading some to describe this as one of the worst merger-enforcement mistakes in decades. See for example, [The T-Mobile/Sprint Merger: A Disastrous Deal From the Start \(promarket.org\)](#) by Wang and Prof Scott Morton; [Microsoft Word – Kwoka Sprint T-Mobile Settlement 8.21.19 F.doc \(antitrustinstitute.org\)](#), Prof Kwoka, American Antitrust Institute; [The Terrible T-Mobile/Sprint Merger Must Be Undone | WIRED](#); [An Engineer’s View of the Department of Justice’s T-Mobile/Sprint/DISH Strategy | Benton Institute for Broadband & Society](#).

⁶⁶ CMA Merger remedy evaluations, 24 October 2023, para 1.4 [CMA report on case study research \(publishing.service.gov.uk\)](#).

⁶⁷ [Merger control and public policy - GOV.UK \(www.gov.uk\)](#).

116.  The CMA has itself recognised that Sky is in a unique position as the only MVNO that currently provides some real constraint on the MNOs: *“Sky Mobile competes against all four MNOs and their sub-brands, and there are significant overlaps in their target customer bases.”* and it *“has had a strong competitive strategy and recent growth.”*⁶⁸
117. , Sky wants to reiterate that the CMA must ensure that we are given further opportunities to comment on any remedies in advance of and/or in response to the CMA's provisional decision on remedies. Failing to engage with Sky further would be a serious procedural error.
118. Moreover, given that there is no evidence that the Parties proposed remedies would be effective and comprehensive – indeed the reverse given that these types of remedies have failed before – the CMA has no choice but to put in place stronger remedies, particularly where there is now a specific, credible workable remedy being proposed. Failing that the Merger must be blocked. To do otherwise would be entirely inconsistent with its own legal framework and a serious error of law.

⁶⁸ Provisional Findings, para 8.244 and 8.264 respectively.